No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

REPLY BRIEF FOR APPELLANT.

HAROLD A. BLACK,
G. RICHARD DOTY,
McCUTCHEN, BLACK, HARNAGEL & GREENE,
727 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellant The Flintkote Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

Plaintiffs' "Statement of the Case" Is Distorted and Misleading.

Flintkote contends that its statement of the case in its opening brief was entirely accurate and was complete enough for the proper consideration of all matters involved in this appeal. It was prepared in strict compliance with paragraph (c) of Rule 18 of this Court. Plaintiffs have noted no particular in which Flintkote's statement of the case was erroneous, but, in lieu thereof, they have attempted to substitute an inaccurate, erroneous, unfair and inflammatory statement of what they wish the case had been. Plaintiffs' statement of the case embraces substantially 30 pages of their brief. Very few of the statements contained therein are unobjectionable.

Frankly, we had had some difficulty in determining what to do about this situation. We certainly could not be expected to put up with this sort of thing in silence. Nor could we expect this Court to accept our characterization of plaintiffs' statement of the case without documenting what we say about it. Yet to point out specifically each erroneous or misleading statement and to specify wherein it was faulty would require more space than plaintiffs' statement itself. We have decided to select, and print in an appendix to this brief, a number of examples (by no means a complete list) which should suffice to show the cavalier manner in which facts were ignored in plaintiffs' statement.

II.

The Evidence Does Not Support the Verdict. Plaintiffs Have Failed to Show Any Evidence That Flintkote Knowingly Participated in an Unlawful Conspiracy.

The basic question to be determined in connection with our first specification of error is whether there is any evidence in the record justifying a conclusion that Flintkote was a knowing participant in an unlawful conspiracy.

Plaintiffs have pointed to no evidence rebutting the direct testimony that Flintkote neither participated in nor knew anything about any conspiracy among certain contractors to fix prices and allocate jobs. Plaintiffs do not contend that this testimony has been shaken.

They say (Appellees' Brief, p. 31):

> "Concisely stated, the question now before this Court is whether there was any evidence in the record supporting the jury's conclusion that Flintkote knowingly agreed with appellees' competitors to destroy or restrain appellees' ability to compete in the in-

dustry for the stated purpose of aiding the contractors' monopoly."

They then proceed to assume, or even worse, characterize as "admitted" the very points which they say are at ssue before this Court (either ignoring or misstating :he evidence on this subject) and assert, for example:

". . . after agreeing with its co-defendants to eliminate appellees' competition" (*id.*, p. 32).

". . . after Flintkote agreed to and did in fact destroy appellees' competition" (*id.*, p. 33).

"The evidence stands uncontroverted that the sole and only purpose of these latter admitted meetings was to discuss appellees' competitors' demands that Flintkote agree to destroy appellees' ability to compete."

". . . its conspiratorial act in agreeing with appellees' competitors to put appellees out of business." (*id.*, p. 34.)

"The common purpose here was admittedy to put appellees out of business" (*id.*, p. 37).

"Appellant through its own witnesses affirmatively introduced evidence of numerous meetings between Flintkote officials and appellees' competitors for the sole purpose of discussing these competitors desire to have Flintkote aid them in destroying appellees competition." (*id.*, p. 39.)

Let us briefly refer to the record on these matters:

(1) When plaintiffs started dealing in the Los Angeles area there were *individual* complaints by the Flintkote contractors. The chief complaint was that Flintkote had set up a new account in the Los Angeles area without notifying them. (Ragland, R. 805; Baymiller, R. 984; Hoppe, R. 1011; Lewis, R. 1047; Krause, R. 1127, 1142.)

(2) There was no general demand by the Flintkote contractors that plaintiffs be cut off. There was no flat and unequivocal demand by any of the Flintkote contractors that Flintkote terminate relations with the plaintiffs. Mr. Krause at first became angry that a new account had been established without notification and "requested that action be taken to correct the situation". (Lewis, R. 1047.) But he was told quite emphatically that Flintkote would do what it thought best (Krause, R. 1125) and, after he had cooled off, he accepted the proposition that Flintkote had the right to do what it pleased (Krause, R. 1142). Apart from the hearsay testimony as to the alleged Ragland declarations, which we submit was improperly admitted and should be disregarded—there is no evidence of any other demand by a Flintkote contractor that the plaintiffs be cut off. Mr. Baymiller's testimony is that no one of the Flintkote customers suggested by act, word or deed that Flintkote terminate the plaintiffs' account if Flintkote found they were doing business in the Los Angeles area (Baymiller, R. 989).

(3) At all of these interviews Flintkote representatives uniformly and immediately stated that plaintiffs were not supposed to be operating in the Los Angeles area (Krause, R. 1127; Howard, R. 1151; Baymiller, R. 984).

(4) There was no promise or agreement made to cut off the plaintiffs. The Flintkote representatives unequivocally stated that they would take such action, if any, as Flintkote in its own discretion deemed best (Harkins, R. 1066; Krause, R. 1125, 1126, 1128; Howard, R. 1152; Lewis, R. 1047; Baymiller, R. 951, 984).

(5) There is no evidence of any combination, agreement or conspiracy among the dealers or even among the Flintkote dealers to force or induce Flintkote to cut off plaintiffs. Even if it be argued, which we deny, that

the existence of such a combination could be inferred, there is no evidence that Flintkote knowingly joined it.

(6) There is no evidence whatever that Flinkote had any discussions or contacts with the contractors who did not handle Flintkote products.

Plaintiffs' brief does not in any respect meet, answer or in any way tend to weaken the points made at pages 46 to 60 of Flintkote's opening brief. Instead, they apparently hope that by assuming the facts in issue and attempting to shift the argument to immaterial points which are favorable to them or undisputed, while ignoring the central issues, they will obscure the true nature of the case from the Court. The distortion and misstatement characteristic of plaintiffs' "Statement of the Case" is continued and developed throughout this section of their argument. As was the situation with respect to plaintiffs' "Statement of the Case," it would be impossible within reasonable limits to discuss every erroneous or misleading statement appearing in the brief, but we feel compelled to point out some of the more flagrant inaccuracies and misrepresentations.

At page 31 plaintiffs state that Flintkote's argument is based on the three "untenable propositions" therein set forth. Paragraph 1 asserts that we wish this court to examine certain isolated portions of the evidence to the exclusion of all other evidence. That is patently false. Flintkote's position in regard to its motion to set aside the verdict is that there is no substantial evidence in the record that Flintkote knowingly participated in an unlawful conspiracy. Flintkote asks that the court consider the *entire* evidence in the case; it has diligently searched the record and has attempted to find all the evidence which might conceivably be thought to show such knowing participation by Flintkote; it has analyzed that evidence to show that it is insufficient to establish the knowing

participation which is prerequisite to a verdict for plaintiffs. Plaintiffs have not pointed to any additional evidence relevant on this point, and it is submitted that there is none.

Paragraph numbered 2 on page 31 of appellees' brief, it is submitted, does not state any "proposition" at all. Further, the court's instructions and the jury's verdict are utterly immaterial to the question whether there is evidence to support the verdict. (Flintkote also excepts to the reference to "Flintkote's agreement with appellees' competitors to destroy their business" because (1) the issue here is whether there is evidence that Flintkote knowingly participated in a conspiracy, (2) there is no suggestion that the "destruction" of appellees' business was ever mentioned by anyone, (3) appellees' business was not destroyed.)

Paragraph numbered 3 on page 31 of appellees' brief (1) assumes evidence to show an agreement with "appellees' competitors" (which is one of the issues to be argued), (2) assumes evidence of "destruction" (which plaintiffs' own evidence conclusively proves did not occur), (3) states "knowledge" as a fact (although whether there was evidence thereof is part of the issue), and (4) refers to "inevitable effect" (which was never shown) and "unlawful character" (which is a principal issue).

In the last paragraph on page 31, plaintiffs refer to "the contractors' monopoly." The evidence will not support the characterization. There was no attempt to show the relevant market, the number of persons engaged therein, the volume of business done, the volume of business controlled by the so-called "defendant contractors," the extent of the success of any conspiracy to monopolize which might have existed (the proof, it will be recalled, went solely to a conspiracy to fix prices and allocate jobs and had nothing to do with monopoly), the extent to

which effective competition in the undemonstrated relevant market was prevented or hindered, or any other matter necessary to proof of monopoly. For a general analysis of proof of the relevant market and the control thereof necessary to a showing of monopoly, see,

United States v. E. I. du Pont de Nemours and Company, 76 S. Ct. 994, 1004-16 (1956).

The reference in the last two lines on page 31 to "the entire conspiracy and monopoly existing in the industry as a whole" is similarly wholly unwarranted by any evidence.

Plaintiffs, at the top of page 32 of their brief (and at pp. 73 and 85), state that a combination or conspiracy to eliminate the competition of plaintiffs would be a *"per se* violation of the Sherman Act." That is not a correct statement of the law, and the cases cited on page 73 do not support it. The *Darnell, International Salt,* and *National City Lines* cases were all monopoly cases, and, as has been demonstrated, there was no proper proof of monopoly in this case, and further, plaintiffs' statement is not based on monopoly, but is at least ostensibly referring to a conspiracy under Section 1 of the Sherman Act. The *Socony-Vacuum* case cited by plaintiffs does not support the proposition asserted by plaintiffs and, in any event, was reversed by the Supreme Court (*United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811 (1940)). The *Village Theatre* case, cited by plaintiffs, conclusively establishes that the law is otherwise than plaintiffs claim it to be. That case involved an alleged conspiracy to exclude plaintiffs from bidding for first run Paramount pictures. At page 726 of 228 F. 2d, the court said:

> "The mere agreement among Paramount Film, United and Intermountain that films were to be distributed to Intermountain and other downtown

> theatres on a competitive bidding basis, to the exclusion of the Villa Theatre, *was not in itself per se unlawful. It presented an issue of fact as to whether there was an unreasonable restraint of trade and that issue should have been submitted to the jury,* as requested by tendered instruction of the defendants." (Emphasis added.)

The second sentence in the first full paragraph on page 32 says that Flintkote "must also admit there was evidence showing" a whole series of things. Flintkote makes no such admission and submits that there is no evidence showing any of the things there listed, whether at the cited pages or elsewhere in the Record. As previously noted, there was no showing of a monopoly by the contractors named as defendants. There was some inconclusive testimony (R. 272) that the prices charged by the various manufacturers were "parallel and equal" to Flintkote prices, but that hardly establishes a "total lack of price competition." Plaintiffs refer to elimination of competition through policies "whereby a single defendant contractor constituted the sole outlet for two otherwise competing lines of tile," but plaintiffs' own chart, on page 8 of their brief, shows that statement to be false. Probably the most serious misrepresentation in this section of the brief is the statement that "the *admitted* purpose of terminating appellees' only available source of supply was, in addition to the destruction of appellees' competition, to perpetuate and preserve this non-competitive picture in the industry" (p. 32). Flintkote never made any such admission or admitted that any part of that statement bears any resemblance to the truth. Nothing in the evidence in any way tends to support that bald misstatement. Needless to say, the assertion finds no support in the pages of the Record cited immediately following it. Flintkote admits that plaintiffs were suffi-

ciently qualified to be approved as Flintkote contractors in the San Bernardino-Riverside area. It did not admit that they were sufficiently qualified to be approved as Flintkote contractors in Los Angeles. In Harkins' words, "The discussion with them was whether they wanted to go into business in San Bernardino or not." (R. 1079.) There is no indication anywhere in the Record that plaintiffs were at all qualified to run an acoustical business, although there is abundant testimony that they were thoroughly experienced salesmen and applicators.

The first sentence in the last paragraph on page 32 is inaccurate in that it refers to Flintkote "officials" and "appellees' competitors," whereas the meetings were between Flintkote employees who were not officers and Flintkote contractors. The second sentence of that paragraph is inaccurate in that there is no direct evidence that Flintkote agreed to do anything, much less to "eliminate appellees' competition"; as previously noted, the suggestion that Acoustics, Inc., was "inexperienced" is not warranted by the evidence.

The first sentence in the first paragraph on page 33 is wholly false: the exhibit shows nothing with respect to whether or not Flintkote agreed with anyone to do anything; it merely shows that its sales were greater in 1952 than they were in 1951. The second sentence is false in that it misstates Flintkote's defense which certainly had nothing to do with "where Flintkote's co-conspirator contractors operated."

What has been said should be enough thoroughly to discredit the professedly factual statements appearing at pages 31 through 34 of plaintiffs' brief. The failure to discuss specifically the statements in the last half of page 33 and on page 34 does not constitute an endorsement thereof, and it is submitted that, for the most part, they too are inaccurate in varying degrees.

The authorities cited and discussed in this section of plaintiffs' brief do not militate against the position taken by Flintkote; they are entirely consistent therewith. Flintkote agrees that circumstantial evidence, without any direct evidence, may provide sufficient support for a verdict in a proper case, but it contends that the circumstantial evidence adduced here was insufficient to do so in this case. Flintkote agrees that if it participated in a conspiracy at all it is liable for all acts done by all co-conspirators in furtherance of the conspiracy, whether before or after its joinder therein, but its position is that the evidence is insufficient to show any participation by Flintkote in any conspiracy at any time or at all. It agrees that knowing participation in an unlawful conspiracy "is sufficient to hold a co-conspirator"; its position is that the evidence is not sufficient to support a finding of such knowing participation. Flintkote takes no issue with the *Paramount* case, but denies that it is applicable to the facts here.

As stated at the top of page 49 of Flintkote's opening brief, "The issue, then, is whether the evidence will support a finding of 'knowing participation' in an unlawful conspiracy." On the pages following Flintkote analyzed the evidence to demonstrate that the evidence would not support findings either of "knowledge" of a conspiracy or of "participation" therein by Flintkote, much less a finding of "knowing participation." Plaintiffs have not offered any shred of evidence which was not adequately discussed and completely disposed of in Flintkote's opening brief. It therefore seems pointless to repeat that argument here, and Flintkote will not do so.

At pages 36 and 37, plaintiffs refer to the *Las Vegas Merchant Plumbers* case and attempt to place Flintkote in Alsup's position. Alsup's position was wholly dissimilar to that of Flintkote in that there was substantial evidence

that Alsup was an active participant in the conspiracy and one of the organizers thereof. Plaintiffs have quoted a minor and misleading portion of this Court's discussion of the evidence against Alsup. This Court's full summary of the evidence against Alsup was as follows (at p. 750 of 210 F. 2d):

> "Alsup raises the contention that the evidence was not sufficient to support his conviction, but the record shows his active participation in the conspiracy from its inception in mid-August of 1950. He was present and participated in the first meeting between the plumbing contractors, when the organization and the setting up of an estimator was discussed. Bates, a plumbing contractor present at the meeting testified that he said to Alsup that he 'did not see how the deal could be made to work.' Alsup replied that he thought 'we will have something that will work this time.' He said he was in a position where if the people did not go along with him he was in a position to get them to comply. The evidence shows further that Alsup forbid journeymen plumbers, employees of Ritter, a contractor, to work for Ritter until he promised to withdraw a bid which he had given out of line with the purpose of the conspiracy. In addition, Sylvester, an outside plumbing contractor who was awarded a plumbing contract on the Las Vegas race track went to Alsup's office to obtain men. Two of the plumbing contractors, appellants herein, attempted to get him to back out of the deal. In Sylvester's presence they asked Alsup to protect them. Alsup readily furnished plumbers to Sylvester on another project for the Atomic Energy Commission at the same time he refused to furnish plumbers to work at the race track. The jury could rightfully infer, and so did, that Alsup's actions were in answer

> to the pleas of the plumbing contractors that they be protected."

Obviously the evidence against Flintkote is not even remotely equivalent to that against Alsup, and there is no analogy between that case and this.

Flintkote particularly excepts to the statement in the middle of page 37 of plaintiffs' brief that "The common purpose here was admittedly to put appellees out of business and thus maintain the monopoly of their competitors." There is absolutely no evidence in the record of any such admission by anyone, and, on the contrary, the record is uniformly to the effect that every witness, except plaintiffs, denied that there was any common purpose, agreement, or design whatsoever. Further there is no proof of monopoly in anyone.

The argument appearing at pages 38 through 40 of plaintiffs' brief consists merely of a statement of plaintiffs' conclusion that the evidence is sufficient to support the verdict. No attempt is made to demonstrate by reference to the record that any facts existed which were not discussed in Flintkote's brief and demonstrated to be insufficient.

The *Paramount Pictures* case is immaterial in this connection. Flintkote's position is that the evidence is insufficient to show knowing participation in a conspiracy. Whether coerced participation is any different from voluntary participation is not involved, since Flintkote's contention is that the evidence does not show knowing participation in any form, voluntary or coerced, or at all.

The final statement in this portion of plaintiffs' brief (p. 45) that the jury's verdict provides "The conclusive answer here" is simply ridiculous. In the first place, the issue is whether the evidence will support the verdict, and the fact that the jury returned the verdict is of no

value in the resolution of that issue. In the second place, the jury's verdict was not as stated in that paragraph; no special findings were made; the court's instructions were such that the jury could have returned its verdict without making any such finding (see specification of error number 5 and pages 76-82, Flintkote's opening brief); there is nothing anywhere in the Record to indicate what, if anything, the jury found, except that it was in favor of plaintiffs and against Flintkote and that the damages were $50,000.00.

In summary, then, plaintiffs have not, in their brief, taken issue with, met, or weakened any of the arguments or authorities raised and presented by Flintkote in support of the proposition that the evidence was insufficient to support the verdict, that the trial court erred in failing to set aside the verdict and enter judgment for Flintkote, and that this Court should reverse the judgment and issue its mandate that judgment be entered for Flintkote.

III.

The Trial Court's Prejudicial Errors With Respect to Admission of Evidence Were Not Waived. Plaintiffs Have Failed to Show That the Evidence Was Admissible.

In our opening brief we complained of two major errors with respect to the admission of evidence:

(1) Evidence with respect to the activities of certain contractors in connection with job allocation and bidding on public projects which was received without proof of any connection with Flintkote (Specication of Error No. 2, Op. Br. p. 11).

(2) Admission of hearsay testimony with respect to alleged declarations of the witness Ragland (Specifications of Error Nos. 3 and 4, Op. Br. pp. 11-13 and 13-20).

Plaintiffs' brief attempts to deal with both of these matters in the same section, but as they involve somewhat different situations, they should be treated separately. As plaintiffs have devoted most of their time to the Ragland declarations, we shall reply on that subject first.

A. The Alleged Ragland Declarations Were Clearly Inadmissible.

At the outset plaintiffs say that the trial court's ruling on this evidence "would not seem to be reviewable by this Court in the absence of a clear showing of an abuse of discretion to the prejudice of appellant" (Appellees' Br. p. 49). It is hard to know what this means. Plaintiffs seem to be saying that the trial court can follow the rules of evidence, or disregard them, at its pleasure. Certainly it cannot seriously be contended that the trial court has any discretion to receive inadmissible evidence; and no principle could be more thoroughly settled than the rule that where clear error is shown, which has a potential connection with the verdict, prejudice is presumed, and the party responsible for the introduction of the improper evidence must, in order to prevent a reversal, demonstrate that the error was not in fact prejudicial.

5 C. J. S., Appeal and Error, §1677, p. 812.

This question was fully considered by this Court in

Lynch v. Oregon Lumber Co., 108 F. 2d 283, 285-286 (9th Cir., 1939),

and the conclusion was reached that "if error is shown, then there should be reversal 'unless it *affirmatively* appears from the whole record that it was not prejudicial' " (p. 286).

Plaintiffs have cited no authority in their brief overcoming or even casting doubt on the proposition that this testimony with respect to Ragland's alleged admissions

was pure hearsay and inadmissible. We shall not repeat the argument set out on pages 66 to 76 of our opening brief. The inadmissibility of this testimony depends primarily upon the elementary principle of the law of agency that the declarations and admissions of subordinate corporate agents are binding upon a corporation only when made in connection with the particular business entrusted to them and only when made in the course of a transaction then being executed for the principal. Mr. Ragland had no authority, express or implied, to bind Flintkote by these admissions, assuming they were made. Of all of the Flintkote people connected with the matters at issue, Mr. Ragland was at the bottom of the ladder. There is no showing that he had authority to make a decision on anything. Specifically, the evidence shows that he was junior to Mr. Baymiller, who was assistant to Mr. Thompson, who in turn was subordinate to Mr. Harkins. Plaintiffs cannot increase Mr. Ragland's authority by inventing and conferring upon him the title of "Chief Promotional Man," either in capitals or in small letters.

Certainly plaintiffs can get no comfort from

> *Pan-American Petroleum Co. v. United States,* 9 F. 2d 761 (9th Cir., 1926).

In that case, Doheny, as president of the two defendant corporations, was the man in complete charge of the transactions called into question in the case, and testified on behalf of these companies at a Senate Committee hearing. The court quite properly held that what he said at that hearing was binding on the two corporations which he dominated. Similarly, in

> *Vitagraph, Inc. v. Perelman,* 95 F. 2d 142 (3d Cir., 1936),

the declarations of the president of certain corporations which were made at the meeting where he was authorized to speak in their behalf were held admissible. These

cases do not even remotely support the contention that a mere salesman, not at the time engaged in any transaction authorized by his employer, could make narrative admissions binding on his corporate principal with respect to past events.

Nor are the cases regarding declarations of co-conspirators of any help to plaintiffs. Their cause in this connection is not advanced by the unsupported assertion that

> "the evidence clearly shows that Ragland and other Flintkote officials [*sic*] were in fact unnamed co-conspirators in the case" (Appellees' Br. p. 51).

Ragland, as a Flintkote employee, was not and could not be a co-conspirator with Flintkote. There is no showing that he did anything in his individual capacity, or that he could be called a co-conspirator with the contractors. Apart from all this, his alleged declarations could not be admitted against Flintkote without independent proof of Flintkote's participation in the contractors' conspiracy.

In any event, the act of reciting to the alleged victims of a conspiracy a mere narrative account of past transactions of alleged conspirators could not be called an overt act in furtherance of the conspiracy. See the cases cited at the bottom of page 72 of our opening brief. The dictum in

> *International Indemnity Co. v. Lehman,* 28 F. 2d 1 (7th Cir., 1928),

is against the weight of authority, and as the concurring opinion in that case points out, the court's ruling is not supported by the authorities cited (28 F. 2d at 4).

Nor, as we have shown in our opening brief, can this testimony be accepted on the theory that it was part of the *res gestae.* In one of the very cases cited by plaintiffs, *Flannagan v. Provident Life & Accident Ins. Co.,* 22 F. 2d 136 (4th Cir., 1927), the court at page 139 cites with

approval the statement in *Boston, etc., Ry Co. v. O'Reilly,* 158 U. S. 334, 15 S. Ct. 830, 39 L. Ed. 1006, "The mere narration of a past occurrence is not a part of the res gestae of that occurrence."

We, of course, agree that the subject-matter of the alleged Ragland admissions is relevant to the issues here involved. That is not what we are complaining about. If the testimony were completely irrelevant, it would not be so prejudicial. The fact that the subject-matter is relevant does not make hearsay testimony proper.

B. The Error in Admitting This Testimony Was Not Waived.

The record shows that timely objection was made, both to the testimony of plaintiff Waldron and that of plaintiff Lysfjord; that the matter was extensively argued; that the objections were overruled; that a motion to strike all of the testimony was specifically made at the time of the close of plaintiffs' case; and that the motion was denied. (See Specifications of Error Nos. 3 and 4, Op. Br. pp. 11-20.) As the Lysfjord testimony was the more vicious, Flintkote made an additional motion to strike that testimony at the conclusion of all of the evidence, and this motion was also denied (R. 1215). Plaintiffs cite cases for the well-established principle that error in ruling on a motion for a directed verdict at the close of plaintiff's case is waived if, after the motion is denied, the defendant introduces evidence. We have no quarrel with this rule, but it has nothing whatever to do with Flintkote's right to rely on errors of the trial court in admitting evidence. It is thoroughly settled that a single objection to evidence clearly made and definitely overruled is sufficient to preserve the error for all purposes and that the objection need not be repeated. See

I Wigmore on Evidence 331 (3d Ed., 1940);

Salt Lake City v. Smith, 104 Fed. 457, 470 (8th Cir., 1900).

Flintkote did not waive its objections by introducing testimony by Ragland denying the making of the declarations and by the alleged participants in the alleged meeting to the effect that the events described in the alleged declarations did not in fact occur. If is of course true that where a certain *fact* is attempted to be proved by inadmissible evidence and the court improperly admits the testimony, the error is cured if the opponent proves the same *fact* by his own testimony. There is, however, a clear distinction between this situation and that where a party, after improper evidence is admitted over objection, offers testimony *denying* the matters attempted to be proved by the inadmissible evidence. In this latter case, the overwhelming weight of authority is that the party does not thereby waive the objection. The rule is succinctly stated in

> 89 C. J. S., Trial, §661, p. 507:
>
> "*Introduction of evidence in rebuttal.* A party does not ordinarily waive his objection to the erroneous admission of evidence by subsequently introducing evidence to disprove the matters testified to, to explain them or to prove facts inconsistent therewith, even though it is of the same kind or nature."

64 C. J., Trial, §1175, page 1292, lists a large number of cases in support of a similar statement. Wigmore recognizes that a party does not waive objections to improper evidence by offering similar evidence merely in self-defense to explain or rebut the original evidence.

> Wigmore, *op. cit.* §18, p. 345.

A leading case on the subject is

> *Salt Lake City v. Smith,* 104 Fed. 457 (8th Cir., 1900).

In this case testimony given at a former trial was read into evidence over the objection of the defendant,

and the defendant thereafter rebutted this evidence in part by the testimony of other witnesses at the former trial. In answer to the contention that the objection to the inadmissible evidence was thereby waived, the court said (p. 470):

> "Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question. They had objected to hearsay testimony, and had excepted to the ruling which admitted it. They had not invited the error of that ruling, but had protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review. Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict, the plaintiffs could not complain of the error which they had themselves invited, and the defendant's case would be won. If

> they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the statute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. Russ v. Railway Co., 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; Gardner v. Railway Co., 135 Mo. 90, 98, 36 S. W. 214."

The above case was cited with approval in

United States v Konovsky, 202 F. 2d 721, *727* (7th Cir., 1953),

as follows:

> "It is said that the defendants waived their objection in this respect. We do not understand that the mere fact that defendants attempted to meet the erroneous evidence constituted waiver upon their part. [Citing and quoting from Salt Lake City v. Smith, *supra.*] . . . See also Chicago City R. Co. v. Uhter, 212 Ill. 174, 180, 72 N. E. 195, 197; State v. Beckner, 194 Mo. 281, 91 S. W. 892, 896, 3 L. R. A., N. S., 535; and State v. Kile, 29 N. M. 55, 218 P. 347, 351."

The three cases cited in the above quotation all fully discuss and explain the rule.

The rule is the same in California. In

Short v. Frink, 151 Cal. 83, 90 Pac. 200 (1907),

the court admitted, over objection, irrelevant testimony concerning an alleged admission by the defendant. The defendant later took the stand and denied that he had

made any such admission, and it was argued that the objection to the inadmissible testimony was thereby waived. In response to this contention, the California Supreme Court said at page 87 of 151 Cal. and page 202 of 90 Pac.:

> "Nor can we hold that the error was cured by the testimony subsequently given by defendant upon this matter, under the rule declared in *Treat v. Reilly,* 35 Cal. 129, that a party cannot be held to be injured by the admission or refusal to strike out objectionable testimony, if the same party afterwards introduces the same testimony. (See, also, *People v. Marseiler,* 70 Cal. 98 [11 Pac. 503].) In addition to the fact that what was said by plaintiff on this subject was said by him purely in self-defense, solely to meet and explain the objectionable evidence as far as possible, and cannot well be held to have been voluntary (see I Wigmore on Evidence, sec. 18d, note), the testimony of defendant in relation to the interview between himself and Bradshaw differed materially from that given by Bradshaw, in that he said that he told Bradshaw that he had been discharged from the case, thus telling him the truth in the matter, instead of a falsehood."

In

> *Fernandez v. Western Fuse etc. Co.,* 34 Cal. App. 420, 423, 167 Pac. 900, 902 (1st Dist., 1917),

the court said:

> "The fact that the defendant introduced testimony in rebuttal upon this same point does not now estop it from claiming that the testimony was erroneously admitted over its objection. In *Washington Township etc. Co. v. McCormick,* 19 Ind. App. 663, 667 [49 N. E. 1085, at page 1086], the court said: 'Appellant in rebuttal introduced some evidence of the same general character as that objected to. But this

cannot be said to be a waiver of the objections to the evidence introduced by the appellee. It was not invited error. It does not fall within the rule that a party who calls out incompetent evidence thus precludes himself from successfully objecting to evidence of like character introduced by his adversary. . . . The error was committed at the instance of the opposite party, and appellant did all it could to prevent the error. After the court had held over appellant's objection that the evidence was competent, and had permitted appellee—who had the burden—to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by the appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action. . . .'"

To the same effect is

DeRoulet v. Mitchel, 70 Cal. App. 2d 120, 125, 160 P. 2d 574, 577 (2d Dist., 1945):

"But because appellant contended at the trial that such issue was immaterial to a decision of the case she was not thereby inhibited from meeting the proof introduced by her adversary. Neither is she estopped from urging the error on appeal. It is the duty of any litigant in the course of trial to submit to the rulings with reference to the proof of the issues, and after he has done so he may thereafter on appeal demonstrate the error of the ruling to which he made timely objection."

The latest expression of the rule which we have found is in

Hoel v. City of Los Angeles, 136 Cal. App. 2d 295, 310, 288 P. 2d 989, 998 (2d Dist., 1955).

The following extract from the opinion sufficiently illustrates the ruling:

> "Because the attorney for defendant introduced the rest of the police report after this point had been ruled against him counsel for appellants say the error in receiving the extract was waived. Such is not the law. An attorney who submits to the authority of an erroneous adverse ruling, after making appropriate objections, does not waive the error in the ruling by introducing responsive evidence to offset or explain the erroneously admitted evidence so far as possible. He is entitled to make the best of a bad situation, not of his own creation. There is no element of waiver or estoppel in such conduct of counsel."

The case of *Trouser Corporation v. Goodman & Theise,* 153 F. 2d 284 (3d Cir., 1946), cited by appellees, is plainly out of line with the current of authority on the subject. The court there, it is submitted, confused a situation where proof of the *fact* sought to be established by the improper testimony is made by the objecting party himself, which constitutes a waiver, and the situation where the objecting party offers testimony *denying* the fact sought to be proved by the improper evidence. The footnote on page 288 of the opinion recognizes this distinction, but it seems quite obvious that the court misapplied the rule to the facts before it.

United States v. Gruber, 123 F. 2d 307 (2d Cir., 1941), is not in point. There the defendant's evidence in effect admitted that certain charges of bribery (alluded to in plaintiffs' improper evidence) had in fact been made. Furthermore, it was pointed out that the court did not admit the testimony for the purpose of proving the truth of the alleged charges. *Bevard v. Bevard,* 103 F. Supp. 533 (D. D. C., 1952), is also not in point, as there the

fact established by the objectionable testimony was brought out by plaintiff's own cross-examination. *National Distillers P. Corp. v. Companhia Nacional, etc.,* 107 F. Supp. 65 (E. D. Pa., 1952), is likewise not exactly in point, as there the objecting party went beyond mere rebuttal, and attempted to use the same class of opinion evidence to which objection had been made to support his own case.

On principle, the rule established by the vast majority of the cases on this subject is unassailable. At the trial, Flintkote was confronted with objectionable hearsay evidence. It did everything in its power by objection, motion to strike and extended argument to induce the court to exclude the improper testimony. After that effort failed, Flintkote under any rational system of law should not be compelled upon pain of waiving its valid objection to concede the truth of the objectionable evidence. Flintkote was certainly entitled in this situation to call Mr. Ragland to the stand to deny the making of the alleged admissions and to produce the alleged participants in the alleged meeting to deny that any such meeting had taken place, and that the statements allegedly made at said meeting were entirely untrue. It seems clear that by so doing, Flintkote did not waive the original error, and after an adverse jury verdict, which may well have been influenced by the improper testimony, Flintkote may ask this Court for relief.

C. The Objectionable Testimony Was Highly Prejudicial.

There can be no reasonable argument that this highly colored and inflammatory testimony, particularly that of Lysfjord, did no damage to Flintkote. Nor is it true that appellant's own witnesses tended to prove the same facts. Lysfjord described an alleged general meeting between Howard, Krause, Newport and Lewis at which objections were made to the aabeta company being in busi-

ness. This, of course, suggested a concert of action, and was exactly contrary to all of the other evidence in the case, which was to the effect that Flintkote representatives called on the Flintkote contractors *individually,* stated that the plaintiffs were supposed to be doing business only in Los Angeles, that Flintkote proposed to investigate the situation, and that it would take such action, if any, as it in its own judgment thought appropriate. Apart from the possible suggestion of this hearsay testimony, the record stands uncontradicted that Flintkote made no promise or agreement with anybody to terminate relations with the plaintiffs.

This hearsay testimony also includes the statement (denied by all other witnesses) that Mr. Newport threatened to "boycott" Flintkote and spend a large sum of money to see to it that Flintkote materials were not used in the Los Angeles area unless the plaintiffs were cut off. Lysfjord also suggests that there was another "meeting" at the Flintkote office at which Mr. Krause is supposed to have become very abusive. Waldron's testimony about this alleged meeting is to the same general effect. These alleged meetings apparently were in addition to the conversations with the Flintkote contractors related by defendant's witnesses.

True enough, we have argued, and still argue that the evidence in this case, even if this testimony is accepted, falls short of proving knowing participation on the part of Flintkote in any conspiracy, and that this Court should find, even with this testimony in the record, that the trial court erred in denying defendant's motion to set aside the verdict. But if this Court disagrees with us on this matter, it must agree that the alleged Ragland declarations, if believed by the jury, would be influential in arriving at a verdict against Flintkote.

D. The Evidence With Respect to the Activities of Certain Contractors Should Not Have Been Admitted Without Requiring Plaintiffs First to Show Flintkote's Connection With the Alleged Conspiracy.

Plaintiffs do not seriously contend that there is any evidence that Flintkote participated in, or had any knowledge of the job allocation scheme suggested by the testimony admitted over Flintkote's objection, and with respect to which Flintkote's motion to strike was denied. They claim, however, that even if Flintkote did not know of this phase of the conspiracy, the evidence could be admitted to explain its intent and purposes.

We do not quarrel with the general principle that once a clear showing is made of a defendant's participation in a conspiracy, other conspiratorial activities of the persons involved can be shown, even though the defendant may not have actually participated in those other acts. Here, however, no participation by Flintkote in *any* conspiracy was proved. The court should have sustained defendant's objection to this line of testimony, and should have granted defendant's motion to strike it. For the reasons set out in the preceding section, defendant did not waive its objection to this testimony by presenting evidence that none of its employees and that none of the Flintkote contractors participated in or had any knowledge of the existence of any such scheme to allocate jobs and agree on bids. Nor was more than one objection and one motion to strike necessary.

If this Court agrees with us that the record does not justify a finding that Flintkote knowingly participated in any conspiracy, judgment should be entered for defendant, and the improper admission of this testimony could be disregarded. But if this Court should be of the view that there was enough evidence of a circumstantial character (the nature of which plaintiffs have been unable to

explain) to require submission to the jury of the issue of Flintkote's knowing participation in a conspiracy, there was still no possible justification in this case for not requiring the plaintiffs to follow the normal order of proof and establish Flintkote's connection with some conspiratorial act *before* permitting the presentation of this evidence as to the questionable practices of certain of the contractors. It is true that the courts have often said that the order of proof is in the trial court's discretion. It is also true in a case involving a large number of defendants, such as that referred to by appellees in the appendix to their brief, it may well be necessary to allow evidence to go in involving one or more of the defendants before a connection is shown with other defendants. But in this case there was no need for resorting to this practice. Here there was but one defendant. If plaintiffs had been required, as the trial court should have compelled them, to show Flintkote's knowing participation in some conspiratorial act before admitting this highly inflammatory testimony, the weakness or non-existence of the alleged connecting evidence would have been brought into sharp relief. Here, by allowing the activities of the contractors to be first presented for several court days, it seems clear that defendant was deprived of a fair trial. As we have pointed out in our opening brief, the jury necessarily was prejudiced against Flintkote by the mere presentation of this evidence that was admissible *only* on the assumption that Flintkote was in some way connected with it. It is altogether naive to contend that the damaging effect of the court's ruling was avoided because the testimony was admitted only subject to a motion to strike. Assuming, therefore, for the purpose of argument that there was a jury issue with respect to Flintkote's participation in a conspiracy, we earnestly contend that the trial court abused its discretion in sanctioning without any reason, and over objection, so prejudicial a departure from the normal order of proof in this case.

IV.

The Errors in the Jury Instructions Were Not Waived. Plaintiffs Have Failed to Show That the Instructions Were Not Erroneous.

At pages 63 through 86 of their brief plaintiffs attempt to answer Flintkote's contentions that the court erred in instructing the jury. Plaintiffs seem to be contending (1) that Flintkote waived any error in the instructions by failing to object thereto, and (2) that the instructions were correct as given. (Plaintiffs do not claim that Flintkote waived any objection with respect to the instructions on damages; those instructions are treated in a later section of their brief and will be similarly treated here.)

Plaintiffs' first, and apparently principal, contention in regard to instructions is that consideration of error therein is precluded at this time by reason of Flintkote's failure to comply with Rule 51, Federal Rules of Civil Procedure, and Local Rule 14 of the trial court regarding objections to instructions.

Flintkote's position is that the trial court was at all times aware of Flintkote's position in respect of the matters here specified as error, that full opportunity was presented to the court by Flintkote to consider Flintkote's position and instruct correctly, that no reasonable opportunity was presented to Flintkote specifically to object to the court's charge to the jury, that the court's instructions were not such that the errors therein could have been cured if Flintkote had objected more specifically when the charge was given, that, under the circumstances, the spirit and purpose of Rule 51 and Local Rule 14 were substantially complied with and neither of those rules should now prevent consideration of the error in the instructions.

It is clear that strict compliance with the terms of Rule 51 is not required in order to raise error in the instructions on appeal. This is especially so where the trial court does not see fit to follow the procedure provided by the rule. It is sufficient for the preservation of the point on appeal if the trial court has reasonably been made aware of the objecting party's position. The following cases all support all three of the foregoing sentences:

United States v. General Motors Corporation, 226 F. 2d 745 (3d Cir. 1955);

Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland, 202 F. 2d 794 (7th Cir. 1953);

Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2d Cir.), *cert. denied,* 343 U. S. 966, 72 S. Ct. 1061 (1952);

Montgomery v. Virginia Stage Lines, 191 F. 2d 770 (D. C. Cir. 1951);

Green v. Reading Co., 183 F. 2d 716 (3d Cir. 1950);

Pfotzer v. Aqua Systems, 162 F. 2d 779, 783 (2d Cir. 1947);

Swiderski v. Moodenbaugh, 143 F. 2d 212 (9th Cir. 1944);

Alcaro v. Jean Jordeau, 138 F. 2d 767 (3d Cir. 1943);

Williams v. Powers, 135 F. 2d 153 (6th Cir. 1943);

Evansville Container Corporation v. McDonald 132 F. 2d 80 (6th Cir. 1942);

Sweeney v. United Feature Syndicate, 129 F. 2d 904 (2d Cir. 1942).

The *Irvin Jacobs* case, *supra,* and the discussion therein seem particularly pertinent here. At pages 800-801 of 202 F. 2d, the court said:

> "Defendant asserts that the propriety of submitting to the jury the questions of compliance with or waiver of the bond provision in reference to proof of claim have not been preserved for review. Defendant argues that plaintiff should have requested a peremptory instruction which it failed to do, and further that three instructions given by the court on the question of the waiver actually were requested by plaintiff.
>
> "In presenting requests for instructions, plaintiff's counsel informed the court that he considered the questions of sufficiency of the proof of claim and waiver were clearly questions of law for the court, but the trial judge replied, 'I think it is a question of fact.' Counsel then replied, 'Very well, then, they should be given as drafted.' Defendant argues that this was an acquiescence by plaintiff and that it is now precluded from raising these points on appeal.
>
> "Rule 46, Federal Rules of Civil Procedure, 28 U. S. C. A., provides that formal exceptions to rulings or orders of the court are unnecessary. Under Rule 51, the objection is sufficient so long as the trial judge understands plaintiff's position. 5 Moore's Federal Practice (2d Ed., 1951), Sec. 51.04, p. 2505. In Moreau v. Pennsylvania R. Co., 3 Cir., 166 F. 2d 543, 545, the court said, '* * * Counsel must make his points clearly so that the trial judge may see what they are and if he believes they are right, follow them. But he is not required to indulge in reiterative insistence in order to preserve his client's rights.' It has also been held in a recent case, Keen v. Overseas Tankship Corp., 2 Cir., 194 F. 2d 515,

certiorari denied 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363, that Rule 46 had been complied with and the point preserved for review where counsel made his point in a colloquy with the judge and had been overruled, even though counsel did not except to the ruling or the charge. The court stated, 194 F. 2d at page 519: '* * * Moreover, the plaintiff's failure later to repeat the objection, or to conform literally to Rule 51, was not a "waiver" of the ruling against him; he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him. Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided.' We hold that these questions raised by plaintiff were properly preserved for review."

The matter of what was necessary to prevent waiver of error in the instructions was thoroughly considered in the *Montgomery* case, *supra,* where the court said, at page 773 of 191 F. 2d:

"If [the requested instructions] were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46."

The *Green* case, *supra,* is as nearly "on all-fours" with the present case as one could reasonably expect. The court there analyzed the situation as follows (at p. 719 of 183 F. 2d):

"The plaintiff urges, nevertheless, that the error of the charge is not available to the defendant as an issue on this appeal because it made no objection

to the charge before the jury retired. Rule 51, Federal Rules of Civil Procedure. The defendant relies on its request for charge to indicate to the trial court the proper rule. . . .

"We have held that Rule 51 'is designed to preclude counsel from assigning for error on appeal matter at trial which he did not fairly and timely call to the attention of the trial court.' Stilwell v. Hertz Drivurself Stations, Inc., 3 Cir., 1949, 174 F. 2d 714, 715; Alcaro v. Jean Jordeau, Inc., 3 Cir., 1943, 138 F. 2d 767, 771. But it is likewise true that 'there is no good reason for applying the rule so indiscriminately as to prevent counsel from pointing out on appeal matter which he did endeavor to identify to the trial court and which he had every reason to believe the court fully comprehended when granting an exception.' Alcaro v. Jean Jordeau, Inc., supra, 138 F. 2d at page 771. In the instant case, the learned trial judge in lieu of the procedure of Rule 51, did not rule upon the requests for instructions until after the charge to the jury had been given. Upon the conclusion of the charge, he stated that he thought he covered the requests rather generally, but to protect the parties he would refuse the requests and allow exceptions thereto. Then, counsel were asked whether there were any 'other' exceptions, and counsel for defendant replied in the negative. This was certainly the equivalent of saying, 'Defendant has no suggestions for correction of your charge other than those contained in defendant's requests.' Alaska Pacific Salmon Co. v. Reynolds Metals Co., 2 Cir., 1947, 163 F. 2d 643, 658. Patently, the trial judge granted an exception to such parts of the charge as were inconsistent with, or did not properly cover, the parties' requests. We have no doubt that, despite the alleged errors in the

defendant's request here involved, it was sufficiently specific to direct the attention of the court below to the issue and to the law, that it was adequate to indicate the error of the charge, and that the court comprehended the issue when it granted the exception following the charge. As we held in Moreau v. Pennsylvania R. Co., 3 Cir., 1948, 166 F. 2d 543, 545, 'Counsel must make his points clearly so that the trial judge may see what they are and if he believes they are right, follow them. But he is not required to indulge in reiterative insistence in order to preserve his client's rights.' We conclude, therefore, that the issue here involved was fairly and timely within the cognizance of the trial court, and that the substantive spirit of Rule 51 is satisfied. Cf. Pfotzer v. Aqua Systems, Inc., 2 Cir., 1947, 162 F. 2d 779, 783; Sweeney v. United Feature Syndicate, Inc., 2 Cir., 1942, 129 F. 2d 904, 905-906. Parenthetically, it may be noted that the defendant included the issue asserted by it on this appeal in its motion for a new trial, which was denied."

In the present case, Flintkote's position was fully presented to the court by its requests for instructions prior to the commencement of the trial. At the initial conference of counsel and the court in chambers immediately prior to the trial, Flintkote objected to references to defendants and to a verdict against some but not all defendants contained in instructions proposed by plaintiffs (R. 155-156). At that time the Court indicated that an instruction conference would be had for the purpose of "getting the bugs out of the charges that they have been submitted." (R. 157.) No such conference was had. At the close of all the evidence and prior to argument by counsel to the jury, the court advised counsel that it wished to "simply read the charg-

ing language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into damages doing it as best I can as a condensation from these long instructions you have given, . . ." (R. 1221.) The court's statement of its intentions certainly sounded reasonable enough and indicated that the court reasonably comprehended the scope and nature of the charge required. It gave counsel no warning of the erroneous and prejudicial charge which was actually given. An examination of the charge as given will demonstrate that it was disorganized, confusing, erroneous, and internally contradictory. Counsel for Flintkote specified the errors in the charge which they had specifically noted. Nowhere did they indicate satisfaction with the charge as given. Flintkote was never given an adequate opportunity to review the court's charge and object thereto, and both Rule 51 and Local Rule 14 contemplate that counsel shall be given such opportunity. Since the trial court did not see fit to comply with the rules, it would be incongruous to expect that counsel would or could comply strictly with the letter of those rules; substantial compliance with the spirit and purpose of the rules should be enough; Flintkote contends that it did so comply and that the error is preserved to it in this appeal.

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."
>
> *Hormel v. Helvering*, 312 U. S. 552, 557, 61 S. Ct. 719, 721 (1941).

The authorities cited by plaintiffs at pages 64 and 65 of their brief in no way militate against the position of Flintkote in this connection. The *Zermani* case (200 F. 2d 240), from which plaintiffs quote headnote 4, involved a situation where the appellate court (1) analyzed the instructions and found them adequate and (2) stated that "furthermore" appellate had not, on the facts there presented, adequately complied with Rule 51. *Stilwell v. Hertz Drivurself Stations,* 174 F. 2d 714 (3d Cir. 1949), from which plaintiffs "quote" a modified form of headnote 2, involved a situation where no instruction was requested, no objection was ever made to the instructions at any time, and appellant's position was, apparently, never presented to the court at all. *State Farm Mut. Auto Ins. Co. v. Porter,* 186 F. 2d 834 (9th Cir. 1950), did not involve the situation here presented and was concerned only with the entirely unrelated question of whether the evidence supported the verdict. *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F. 2d 732 (9th Cir. 1954), is not at all in point. That case approved a procedure on instructions which was not in strict compliance with Rule 30, Federal Rules of Criminal Procedure. The procedure followed here was not even similar. The court also noted the failure of counsel suitably to set out in its brief the errors in the charge which were complained of, but it should be noted that this court nevertheless reviewed the claimed errors. *Thorp v. American Aviation and General Insurance Co.,* 212 F. 2d 821 (3d Cir. 1954), involved a case where the "charge was, to say the least, more than merely favorable" to appellants (212 F. 2d at 825); where the instructions conformed with appellants' view of the law as declared to the trial judge; where there was no objection to the charge of any kind; and where the appellate court could say that "This contention comes with mighty poor grace from the defendants" (212 F. 2d at 824). Even

in this case, however, the court recognized that absolute compliance with Rule 51 is not always necessary to preserve errors in instructions on appeal. *Allen v. Nelson Dodd Produce Co.,* 207 F. 2d 296 (10th Cir. 1953), was a case where appellant presented no requests for instructions and made only a very general objection to the court's instructions as given. The court stated the general rule in terms of "ordinarily" and went on to note the court's power to review fundamental error whether or not saved by objection. In *Harlem Taxicab Ass'n v. Nemesh,* 191 F. 2d 459 (D. C. Cir. 1951), the court found that appellant's position had been adequately presented to the trial court and reversed on the ground of erroneous instructions saying that strict compliance with Rule 51 would have been "only a formality" (p. 461). In *Smith v. Welch,* 189 F. 2d 832 (10th Cir. 1951), the court recognized that Rule 51 did not constitute an absolute bar to consideration of errors in instructions, but held that in that case the facts did not warrant departure from the express terms of the rule. *Boston Ins. Co. v. Fisher,* 185 F. 2d 977 (8th Cir. 1950), was a case where apparently no attempt was made to call appellant's position to the attention of the trial court at any time. The court recognized its power to notice "obvious error" (p. 979) but concluded that was not the proper case. We have heretofore discussed *Green v. Reading Co., supra,* and have demonstrated that it held the error in the instructions was preserved for appeal in a case remarkably similar to this one. *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.,* 181 F. 2d 880 (8th Cir. 1950), was a case where the court recalled the jury at the suggestion of counsel for appellees and corrected the error assigned as grounds for reversal.

The foregoing should establish that the error in the instructions was sufficiently preserved for consideration here. The trial court was at all times aware of Flint-

kote's position and had been furnished with a complete and correct set of instructions by Flintkote. There was no point in "reiterative insistence" by counsel.

We do not believe that resort to the "plain error" doctrine is necessary to enable this court to consider the errors in the instructions to the jury. There is, however, a general doctrine that an appellate court may consider error not raised below when necessary to prevent injustice. For discussions of this doctrine and the rationale therefor see

Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F. 2d 13, 15-16 (D. C. Cir.), *cert. den.,* 332 U. S. 755, 64 S. Ct. 1270 (1944);

Dowell v. Jowers, 166 F. 2d 214, 221 (5th Cir.), *cert. den.,* 334 U. S. 832, 68 S. Ct. 1346 (1948);

Hormel v. Helvering, supra.

We recognize that this Court has stated that the "plain error" doctrine is not applicable in this Circuit (*Woodworkers Tool Works v. Byrne,* 191 F. 2d 667, 676 (9th Cir. 1951); *Persons v. Gerlinger Carrier Company,* 227 F. 2d 337, 343 (9th Cir. 1955), but we respectfully request that, if it should be necessary to resort to that doctrine, this Court reconsider its prior statements and prevent the obvious miscarriage of justice which would result if this judgment were not reversed.

No attempt will be made here to reply in detail to plaintiffs' arguments that the instructions were correct, as Flintkote's position in respect of each of the claimed errors is adequately developed in its opening brief. There are, however, a few statements to which Flintkote believes a direct reply is in order.

Plaintiffs have selected portions of the trial court's instructions to the jury which were correct and contend that they suffice to cure the errors complained of. It is

not Flintkote's contention that every statement in the instructions was erroneous. It is agreed that portions were correct. Flintkote does contend, however, that portions of the instructions were incorrect and that prejudicial error requiring a reversal was committed thereby.

At page 72 of their brief (and elsewhere therein) plaintiffs accuse Flintkote of quoting "fragmentary and disconnected parts of the Court's instruction . . . in an apparent attempt to obscure the patent fairness of the Court's charge in this respect." Obviously Flintkote could not set forth the court's entire charge in connection with each specification of error therein, and some identification of the erroneous portions of the charge was imperative in order to frame the issue. To call an attempt to demonstrate wherein a charge was unfair and incorrect an attempt to obscure its fairness is wholly unnecessary and itself merely serves to becloud the issues fairly and properly framed. It should be noted that at no point in their brief do plaintiffs attempt to show that any of the matters designated as erroneous in Specifications of Error numbers 5, 6, 7 and 8 were not erroneous (except for their attempt at pages 73-76 to place this case in the *per se* class, which does not accord with the proof) and in no other manner did they squarely meet any other issue framed by Flintkote with regard to the errors in the instructions.

We have previously adverted to plaintiffs' attempt to place this case in the category of *per se* violations of the Sherman Act (*supra,* pp. 6 to 8). We respectfully refer to that discussion in connection with plaintiffs' remarks at pages 73-76 and 84-85 of their brief. (We also wish to except to the sentence beginning near the bottom of page 84 and continuing on page 85 as a misstatement of the facts and to the characterization "admitted restraint" therein.)

At pages 84 and 85 of their brief plaintiffs argue that Flintkote has not made a sufficient showing that the errors in the instructions were prejudicial. It is submitted that in each case Flintkote has demonstrated the substantial possibility that the error complained of adversely affected the verdict. That is all the showing of prejudice that can be required.

> ". . . if error is shown, then there should be a reversal 'unless it *affirmatively* appears from the whole record that it was not prejudical'."
>
> *Lynch v. Oregon Lumber Co.,* 108 F. 2d 283, 286 (9th Cir. 1939).

It is submitted that plaintiffs' attempt to distinguish the *Voss* and *Applebaum* cases (at page 84 of their brief) is specious and that the cases are in fact entirely in point here.

V.

This Court May Review the Trial Court's Action in Denying the Motion for New Trial.

In section IV of their brief, plaintiffs attempt to reply to Flintkote's contention (Specification of Error No. 11) that the trial court abused its discretion in failing to grant Flintkote's motion for new trial on one or more of three separate grounds. Plaintiffs' principal argument in that connection is that the trial court's action in respect of a motion for new trial "based as here upon the weight of the evidence is a matter entirely within the discretion of the trial court, and . . . is not reviewable by an appellate court." (App. Br. 86.) Plaintiffs cite and quote from several cases in support of that proposition. Examination of those cases will disclose, however, that all of them (except *Shingle*) recognized that the rule stated is not absolute, and that the appellate court may reverse where the trial court failed to exer-

cise its discretion or abused it, and *Shingle* did not purport to discuss the many ramifications of the rule therein stated.

See also:

Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 283 U. S. 520, 51 S. Ct. 501 (1931);

Glasser v. United States, 315 U. S. 60, 87, 62 S. Ct. 457, 472 (1942).

There should be no question but that the trial court's ruling on Flintkote's motion for new trial is subject to review by this Court. The motion was made on each of the following grounds:

> "(a) Substantial and prejudicial errors of law were committed in the course of the trial.
>
> "(b) The verdict of the jury is not supported by legally sufficient evidence.
>
> "(c) The verdict of the jury is against the weight of the evidence.
>
> "(d) The damages assessed by the jury are excessive." (R. 105.)

The motion was denied (R. 148). The trial court's errors of law mentioned in the first ground above are subject to review by this Court independently of whether the trial court erred in denying a new trial because of them, and thus, whether the trial court erred in the denial of the new trial on that ground is immaterial at this point and need not be considered and is not urged by Flintkote.

Error in ruling upon a motion for new trial upon the ground that the verdict is not supported by legally sufficient evidence constitutes an error of law and is clearly subject to review by this Court.

Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561, 562 (9th Cir. 1951);

Boyle v. Bond, 187 F. 2d 362 (D. C. Cir. 1951);

Feinsinger v. Bard, 195 F. 2d 45 (7th Cir. 1952);

Reisberg v. Walters, 111 F. 2d 595 (6th Cir. 1940);

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co., 97 F. 2d 481 (8th Cir. 1938).

Here Flintkote claims that the evidence was insufficient to support the verdict in two respects: (1) the evidence was insufficient to show knowing participation by Flintkote in any conspiracy (this was the subject of Flintkote's motion to set aside the verdict and enter judgment for Flintkote), and (2) the evidence was insufficient to sustain the amount of damages assessed. It should be noted that neither of these matters should be the subject of any discretion in the trial court, and that the trial court's failure to grant a new trial where either of those conditions appear would be substantial and prejudicial error warranting a reversal by this Court.

The motion for new trial on the ground that the verdict is against the weight of the evidence is, we agree, addressed to the sound discretion of the trial court, and it is reviewable only for abuse of that discretion.

6 Moore, Federal Practice 3820, 3902 (1953).

Moore recognizes that the appellate court may review the trial court's action under "unusual or special circumstances" (*ibid.),* and the following cases all recognize the power of the appellate court to prevent abuse of discretion:

Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350, 355 (4th Cir. 1941);

Daffinrud v. United States, 145 F. 2d 724, 725 (7th Cir. 1944);

Charles v. Norfolk & Western Ry. Co., 188 F. 2d 691 (7th Cir.), *cert. den.,* 342 U. S. 831, 72 S. Ct. 55 (1951);

Metzger v. Spector Motor Service, 119 F. 2d 690 (2d Cir. 1941);

Atlantic Coast Line R. Co. v. Hadlock, 180 F. 2d 105 (5th Cir. 1950);

Hill v. Pennsylvania Greyhound Lines, 174 F. 2d 171 (3d Cir. 1949);

Missouri K. & T. Ry. Co. v. Jackson, 174 F. 2d 297 (10th Cir. 1949);

Marsh v. Illinois Cent. R. Co., 175 F. 2d 498 (5th Cir. 1949);

Trout v. Cassco Corp., 191 F. 2d 1022 (4th Cir. 1951);

See, also, cases cited in connection with review on the ground that damages are excessive, *infra.*

In the *Hill* case, *supra,* the court said (at p. 172 of 174 F. 2d):

> "We are not on this appeal concerned with weighing the evidence. We are very much concerned with whether the District Judge abused his discretion in refusing to allow a new trial. In other words, does the record below justify the action of the lower court?"

In the *Charles* case, *supra,* after reviewing the authorities, the Court of Appeals for the 7th Circuit reversed the trial court on the ground that it had abused its discretion in failing to grant a new trial, saying (at p. 695 of 188 F. 2d):

> "In this situation, we think there was a miscarriage of justice. It is one of the exceptional cases which call for a reversal."

The foregoing authorities make it clear that this Court has the power to review the trial court's action to determine whether it abused its discretion and, if so, to rectify the situation by remanding the case for a new trial. At pages 92-99 of its opening brief, Flintkote reviewed the evidence in an attempt to demonstrate that the verdict was so clearly against the weight of the evidence that to permit the verdict to stand would result in a manifest miscarriage of justice and that the court's failure to grant a new trial was a gross abuse of its discretion warranting reversal here. It is submitted that plaintiffs have pointed to nothing in the record which invalidates Flintkote's prior arguments or any portion thereof.

The final ground of Flintkote's motion for a new trial was that the damages were excessive. This Court clearly has the power to review the trial court's action on that motion.

Cobb v. Lepisto, 6 F. 2d 128 (9th Cir. 1925);

Department of Water and Power v. Anderson, 95 F. 2d 577 (9th Cir.), *cert. den.,* 305 U. S. 607, 59 S. Ct. 67 (1938);

Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561 (9th Cir. 1951);

Baldwin v. Warwick, 213 F. 2d 485 (9th Cir. 1954);

Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (9th Cir. 1949), 186 F. 2d 926 (9th Cir.), *cert. den.,* 341 U. S. 904, 71 S. Ct. 614 (1951);

Virginian Ry. Co. v. Armentrout, 166 F. 2d 400 (4th Cir. 1948).

See also:

Southern Pac. Co. v. Zehnle, 163 F. 2d 453 (9th Cir. 1947);

Estabrook v. Butte, Anaconda & Pacific Ry. Co., 163 F. 2d 781 (9th Cir. 1947).

This problem was fully considered and the authorities were carefully reviewed by this Court, sitting *en bank,* in

> *Southern Pac. Co. v. Guthrie,* 186 F. 2d 926 (9th Cir.), *cert. den.,* 341 U. S. 904, 71 S. Ct. 614 (1951).

The majority of the court concluded that it had the power to review the trial judge's action if the verdict was "grossly excessive" or "monstrous," but that the verdict could not be so characterized in that case. Judge Bone concurred in the result, but did not approve of the doctrine that the appellate court "may arbitrarily reduce the size of a verdict merely because it regards it as excessive" (p. 933). Chief Judge Denman dissented because he believed the facts warranted the relief sought. Judge Stephens dissented in a skillful disapproval of "the so-called 'monstrous' doctrine" (p. 934). Judge Mathews concurred in both dissents. In addition to recognizing a general power in the appellate court to review for excessiveness of the verdict, the Court expressly recognized several other grounds upon which it could review the action of a trial court in ruling on a motion for new trial. At page 931 of 186 F. 2d, the Court said:

> "We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced. Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case."

The Court cited

Campbell v. American Foreign S. S. Corporation, 116 F. 2d 926, 928 (2d Cir.), *cert. den.,* 313 U. S. 573, 61 S. Ct. 959 (1941),

where an allowance of maintenance and cure over an estimated 3 year period was reversed on the ground that there was no proof that plaintiff's incapacity would last for 3 years. In all of the following cases, the appellate court reviewed the evidence to determine whether it was sufficient to support the verdict in respect of the damages found and held that it did not:

Boyle v. Bond, supra;

Covey Gas & Oil Co. v. Checketts, supra;

Feinsinger v. Bard, supra;

Reisberg v. Walters, supra (where the court reversed on the ground that the jury failed to include undisputed items of damage in the verdict);

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co., supra.

The above cases indicate that the trial court has no discretion in ruling on the motion for new trial on the ground that the verdict as to damages is not supported by the evidence, and the trial court should be reversed if it erred in its ruling, without regard to any inquiry into whether the verdict was "grossly excessive" or "monstrous" (or, otherwise stated, those cases indicate that a verdict which is not supported by substantial evidence in some particular or particulars is "grossly excessive" or "monstrous" as a matter of law).

At pages 122 through 133 of its opening brief, Flintkote has demonstrated (1) that the evidence was insufficient to sustain a finding of the fact of injury in respect of "lost profits," (2) that the evidence was insufficient to sustain any finding of the amount of damages sustained by reason of any injury in respect of "lost profits," (3) that the verdict greatly exceeded the amount of damages proved in respect of injuries proved (San Bernardino expense and increased cost of tile) and thus must necessarily have been based on "lost profits." In their brief, plaintiffs have not pointed to anything in the record which supplies or even tends to supply any of the deficiencies in proof of the fact of injury in respect of "lost profits" or the amount of plaintiffs' damages in respect thereof to which Flintkote adverted in its brief. It is not disputed (assuming that the evidence is sufficient in other respects, which we do not concede) that the evidence might support a verdict in any amount up to $3,514.75 on a correct theory of the damage period or $14,678.54 on the trial court's incorrect theory (Flintkote's Op. Br., pp. 131-132), but it is contended that a verdict in any larger sum is wholly unsupported by any competent evidence, and the trial court's denial of a new trial on that ground was a clear error of law requiring a reversal of the judgment and a new trial of the action. It is further contended that the damages fixed by the jury were, in view of the evidence presented, so grossly excessive as to be indeed "monstrous"; that the trial court's failure to grant a new trial on that ground constituted a clear abuse of discretion and warrants a reversal of the judgment by this Court.

VI.

The Damages Were Excessive. Numerous Errors Were Committed in Connection Therewith.

In section V of their brief (at pp. 88-111) plaintiffs seek to lump together three entirely separate contentions of Flintkote: (1) The court erred in instructing the jury and admitting evidence with respect to acts done subsequent to the commencement of the action (pp. 100-109 of Flintkote's Op. Br.), (2) The court erred by permitting evidence to be introduced which allowed damages to be based on speculation (pp. 110-114 of Flintkote's Op. Br.), (3) the court abused its discretion in failing to grant a new trial on the ground that the damages fixed by the jury were excessive (pp. 115-133 of Flintkote's Op. Br.). Flintkote recognizes that those problems are similar in that they all relate to damages. Each problem is, however, entirely separate and independent from the others, and any attempt to discuss all of them at the same time leads only to confusion. Therefore, despite plaintiffs' lumping of the issues, we shall persist in treating them separately in this reply.

A. The Court Erred in Permitting Recovery for Acts Done After the Suit Was Filed. This Error Was of Major Importance.

In our opening brief (pp. 100-109) we pointed out the trial court's error in permitting the plaintiffs to recover damages for wrongful acts done after the filing of the complaint (which must be covered, if at all, by a separate action or perhaps by supplemental complaint).

And even more serious, the court allowed recovery for acts which were not unlawful at all, because con-

tinued refusal to sell tile to plaintiffs after the conspiracy ended would not be actionable—and there was no evidence that any conspiracy (participated in by Flintkote or otherwise) continued after the suit was filed.

Refusal to supply tile to the plaintiffs under the applicable authorities must be treated as a series of day-to-day acts, and only such of those acts as occurred before the commencement of the action can be the basis of any recovery.

Plaintiffs have not effectively answered this contention. They refer to the case of *Bigelow v. RKO Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574 (1946), as applying the rule for which we contend, and to the case of *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F. 2d 846 (8th Cir.), *cert. den.,* 343 U. S. 942, 72 S. Ct. 1035 (1952), as illustrating what they say is "the other type of situation." Neither case is actually in point. True, in *Bigelow* the plaintiff brought one action to recover damages for wrongful refusal to supply film on favorable terms up to the time of commencement of suit, and later a second, supplemental action to recover further damages resulting from such failure to supply for a subsequent period commencing with the date of the earlier action. But *Bigelow* does not discuss the rule, even though the pattern taken by the litigation indicates that its correctness was assumed.

Brookside is simply inapplicable to our case. It does not stand for a rule, as plaintiffs seem to say it does, that upon a wrongful refusal to sell merchandise, absolute in terms, a plaintiff may recover (trebled) all of the profits he might have made in perpetuity, or up to the trial, or for any other specified period. In *Brookside,* it was found that defendants' conduct (consisting of a multitude of restrictive conspiratorial practices in addition to a refusal to license pictures "on terms enjoyed by defendants' controlled picture houses") "had the effect of making it impossible for plaintiff to successfully oper-

ness, forcing it to sell to a corporation controlled by or participating in the conspiracy or combination created by the defendants" (194 F. 2d at 850). Among the assets which plaintiff was forced to sell was its 15-year leasehold interest in its theater. The court held that the profits earned and to be earned by the buyer during that 15-year lease could be taken into account in determining the "value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants" (p. 855 of 194 F. 2d). The case involved the destruction of a business and a forced sale thereof. The damages were awarded for the wrongful deprivation of plaintiff of its right to continue in business, not merely for the injuries sustained through possible restriction of its business by reason of refusals to sell, and the court made it clear that the problem before it was one of valuation of a business (194 F. 2d at 854).

There was a long delay between the time of the forced sale and the trial and plaintiff was able to prove from books produced by defendants what the theater actually earned in the hands of the purchaser corporation during most of the 15-year leasehold term. The trial court told the jury that it might consider the profits the theater had earned *"not as fixing the measure of damages"* but merely as "an element to be taken into consideration" in determining what damage the plaintiff had sustained (194 F. 2d at 854). The appellate court specifically stated that this limited used of the evidence of profits made was not inconsistent with defendants' contention that plaintiff's damages were limited to the difference between what plaintiff received from the sale of its property and the fair market value of that property on that date.

That this case bears no semblance to our situation is plain. Here, there is nothing more than refusal to sell Flintkote tile to plaintiffs. Plaintiffs' business was not destroyed. Plaintiffs were not forced to sell their busi-

ness to a nominee or subsidiary of defendant, or at all. Plaintiffs were not deprived of a valuable lease or any equipment or other property. It is undisputed that plaintiffs continued in business through the time of the trial and that plaintiffs have at all times made a profit in that business.

The case at bar is controlled by *Connecticut Importing Co. v. Frankfort Distilleries,* 101 F. 2d 79 (2d Cir. 1939); *Frey & Son v. Cudahy Packing Co.,* 243 Fed. 205 (D. Md. 1917), *reversed* on ground that no combinatoin in restraint of trade proved, 261 Fed. 65 (4th Cir. 1919), and the other decisions cited in our opening brief, holding that wrongful refusal to sell is "a mere repetition or continuation of acts of the same class as that for which the suit was brought" (243 Fed. at 205). In such cases, it is clear that plaintiffs' recovery is limited to the damages for injuries resulting from such of those acts as were done before the bringing of suit. Here there was no contractual commitment to sell plaintiffs tile. Assuming that the initial refusal to sell to plaintiffs was the result of a conspiracy, the continuing refusal to sell would cease to be wrongful as soon as the conspiracy stopped. If the refusal to sell tile continued after the suit was brought, plaintiffs would have to recover, if at all, for the injury resulting from such continued refusals to sell by filing a separate suit, as was done in *Bordonaro Bros. Theatres v. Paramount Pictures,* 203 F. 2d 676, 677 (2d Cir. 1953), or by supplemental action, as was done in *Bigelow* (see 162 F. 2d 520). In either case plaintiffs would have to show that the conspiracy continued after the date of commencing the first suit.

Plaintiffs fail completely in their attempt (App. Br., p. 104) to distinguish our case from these decisions. Here, just as in the cases we cite, there was implied in law a day-to-day continuing refusal to sell to plaintiffs. There was not in those cases, just as there was not here, any

express further demand for merchandise, or any *express* further refusal to supply after the initial refusal took place. In those cases, as here, defendant's policy of refusal to sell could have changed at anytime.

Clearly damages resulting from failure to supply merchandise after the suit was commenced could not be recovered in this action and the trial court erred in allowing the jury to award damages to plaintiffs resulting from inability to purchase tile from Flintkote after July 21, 1952.

The error was of major importance. If the correct rule of damages had been applied by the court, the maximum amount of damage supported by the record would have been $3,514.75. This figure is the sum of plaintiffs' out-of-pocket expenses at San Bernardino, $1,920.00, and the increased cost of tile (that is, the excess paid over what it could have been purchased for from Flintkote) for the entire year 1952, $1,594.75 (Ex. "K"). Three times $3,514.75 equals $10,544.25. Plaintiffs have already received from former defendants the sum of $20,000; hence, even if the trial court's disposition of the $20,000 payment is adopted, plaintiffs have already been paid $9,455.75 more than treble the maximum amount of damage plaintiffs have proved. Plaintiffs therefore should have recovered nothing. Yet the judgment was for $130,000, plus attorneys' fees of $25,000, plus costs, or a total of $155,165.70.

B. The Court Erred in Permitting Speculative Evidence of Damages.

Plaintiffs have cited several cases where expert opinion testimony was admitted in connection with the fixing of damages by reason of lost profits. Flintkote agrees that in a proper case the testimony of *experts* may be used for such purpose, if the evidence shows that the experts are suitably qualified to make their estimates and

if there is evidence on the basis of which the experts can make rational estimates.

It is Flintkote's position that plaintiffs were not qualified as experts on business prognosis and that the evidence is insufficient to enable even a real expert to estimate the profits which they might have made had they been able to buy tile from Flintkote. None of the cases cited by plaintiffs stand for (or even involve) any proposition that a party litigant may speculate upon his damages without any factual basis for his estimates or any showing of his qualifications to make those estimates.

C. The Court Abused Its Discretion in Failing to Grant a New Trial on the Ground That the Damages Were Excessive.

We have heretofore demonstrated (pp. 43 to 46, *supra)* that this Court has full power to review the trial court's action in regard to Flintkote's motion for new trial on the ground that the damages were excessive.

Flintkote's principal contention in this regard is that the evidence is insufficient to support the jury's verdict. It is conceded that (assuming, without conceding, that the evidence is sufficient to show that Flintkote's acts were wrongful) the evidence is sufficient to support both the fact of injury and the amount of the damages necessary to compensate therefor in respect of increased cost of tile and San Bernardino expense. The total of those two items, as shown by the evidence, cannot exceed $14,678.54 even on the plaintiffs' erroneous figures applicable to the period erroneously fixed by the trial court (Flintkote's Op. Br., pp. 131-132), which leaves a minimum of $35,-321.46 of the verdict to be accounted for on some other basis. The only other respect in which plaintiffs suggested that they might have been injured was in respect of profits lost on business not done. The issue is whether the evidence is sufficient to support a finding that plaintiffs were injured in respect of lost profits and whether

the evidence was sufficient to provide a reasonable basis for the calculation of damages in respect of injury in that respect, if such injury was proved.

Pages 122 through 131 of Flintkote's opening brief were devoted entirely to an attempt to show that the evidence was utterly inadequate to support a finding that plaintiffs were injured in respect of profits lost. Plaintiffs' statements in their brief that "the fact of damage — is not disputed in the record and is ignored in the argument of appellant" (p. 88), that "*the fact* of damage is clear and cannot be controverted herein" (p. 89), and that Flintkote's "sole contention relates to the measurement of damages" (p. 89) completely ignore the basic point of the discussion above referred to.

Plaintiffs cite and quote from many cases to establish the proposition that damages may be recovered in respect of profits lost by reason of the wrongful act of a defendant. This proposition is not now and never has been disputed by Flintkote. Flintkote merely contends that plaintiffs must prove injury by reason of profits lost before they may recover damages in respect thereof and that they have utterly failed in such proof here. (Plaintiffs' cases to the effect that rational estimates of damages in respect of injuries proved are permissible do not, of course, tend to dispense with the requirement that the injury be clearly proved.)

Flintkote's thesis that the evidence was insufficient to establish injury in respect of profits lost was stated and developed at some length at pages 122-131 of its opening brief, and the basic law applicable to damages in situations similar to this was fairly and fully stated at pages 115-119 of that opening brief. There is no reason apparent for repeating that argument here. We wish to point out, however, that nowhere in their brief do plaintiffs attempt to show that any of the matters which Flintkote referred to as unproved were proved or that proof of those matters was unnecessary.

Plaintiffs seem to find some significance in the fact that Flintkote offered little evidence with respect to whether plaintiffs were injured or the amount of damages sustained by them. Certainly plaintiffs do not contend that any burden of proving or disproving either of those matters rested on Flintkote. If plaintiffs are to recover for their injuries, *they* must prove the fact of the injury and provide a measure for the damages necessary to compensate therefor. That plaintiffs failed to do. They can receive no comfort from the fact that Flintkote did not go ahead and provide the proof they failed to produce, assuming such proof might have been made.

VII.

The Attorney's Fees Allowed by the Trial Court and Claimed in This Court Are Excessive.

We do not intend to repeat the argument in our opening brief that the trial court's award of $25,000 for attorney's fees was excessive. The reasonableness of an attorney's fee does not of course depend on any one factor, but it is not true, as plaintiffs assert, "that the amount of recovery in an antitrust case does not constitute a principal factor in arriving at a reasonable fee". As a general rule, one *starts* with the results obtained in appraising the value of legal services. It is clear from the authorities we cited in our opening brief that the fee, in the absence of other extraordinary circumstances, must bear some reasonable relation to the amount of damages awarded. This means the actual damages as determined by the verdict, and not as trebled. In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F. 2d 846, 859 (8th Cir. 1952), the court said:

> "The damages were assessed by the jury at $375,000. This was the only recovery that may be attributable to the services of counsel for plaintiff as it was through no effort of theirs that these damages were trebled."

To the same effect is

Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, 571 (7th Cir. 1951), *cert. den.,* 342 U. S. 909, 72 S. Ct. 303 (1952).

The case of *Paramount Film Distributing Corp. v. Village Theatre,* 228 F. 2d 721, 727 (10th Cir. 1955), cannot be relied upon as authority to the contrary. There, injunctive relief was awarded as well as damages, which may well have been an important component of the results obtained by the plaintiff. Furthermore, the Court of Appeals in that case expressly stated that it did not pass on the question presented to it that the District Court's allowance of attorneys' fees was too high; as the case was reversed, the award of attorneys fees was set aside *in toto.*

Plaintiffs have served and filed a petition for attorney's fees on appeal, praying an award in the amount of $13,000. Even if plaintiffs are completely successful in defending against this appeal, an allowance of $13,000 seems extraordinarily high. It is true that plaintiffs' counsel alleges that he has spent in excess of 350 hours in connection with the appeal. While the time devoted to a piece of work is of course one factor that must be taken into account, it is by no means controlling, and it is difficult to understand why such heavy expenditure of time was reasonably required. Ordinarily it would seem that an allowance of about half of what plaintiffs are claiming for attorney's fees would approach the upper limits of reasonableness. In *American Crystal Sugar Co. v. Mandeville Island Farms,* 195 F. 2d 622, 626 (9th Cir.), *cert. den.,* 343 U. S. 957, 72 S. Ct. 1052 (1952), cited by plaintiffs, this court made an allowance of $4,000 for services in connection with the appeal in a case where the trial court awarded $25,000 to cover attorneys' fees up to the time of the judgment.

VIII.

The Trial Court's Disposition of the $20,000 Paid by Former Defendants Was Erroneous.

Plaintiffs in the final section of their brief in effect rely entirely on Judge Tolin's opinion itself as a reason for the correctness of the court's ruling. The decision of Judge Carter in the *Winckler* case adds nothing. As a matter of comity he quite naturally followed Judge Tolin's earlier ruling, and the *Winckler* case is now on appeal before this Court.

We have argued that (making the violent assumption that plaintiffs were damaged by the conspiracy in the amount of the jury's verdict), immediately plaintiffs received the $20,000, they no longer had a cause of action for $50,000, but only for $30,000.

To avoid confusing the jury with the problem of treble damages and the effect of the prior payment, the disposition of the $20,000 was left to the trial court by stipulation (Op. Br., p. 138). The trial court accepted the jury's figure of $50,000, trebled it, and *then* deducted the $20,000. It seems clear that what the court did thereby was to force Flintkote to add $40,000 to the amount the former defendants had paid in mitigation of the damages before the trial commenced. Certainly if any question of "unjust enrichment" is involved here, it is the plaintiffs who have received the undeserved windfall. As the *Claybaugh* case points out, the function of the jury is only to render a judgment for actual damages and the court then triples them. Here, by stipulation, the court was to deal with the matter as if the evidence of the payment of the $20,000 had been offered to the jury. If this matter had been submitted to the jury, the jury would have been obliged to deduct the prior payment of $20,000 from their $50,000 award, and the net verdict necessarily would have been $30,000. Then, and only then, would the court's function of trebling the damages operate. The judgment, therefore, exclusive of attorney's fees and costs, should have been for $90,000, instead of $130,000.

IX.

Conclusion.

This brief has been devoted almost entirely to replying to the assertions of plaintiffs. Flintkote's points and arguments were fully presented in its opening brief and have not been restated here. Plaintiffs have not pointed out anything which militates against or weakens Flintkote's position. It is submitted, therefore, that the judgment should be reversed and the cause remanded with instructions to enter judgment for Flintkote, or, at least, for a new trial.

Respectfully submitted,

HAROLD A. BLACK,
G. RICHARD DOTY,
McCUTCHEN, BLACK, HARNAGEL & GREENE,

Attorneys for Appellant The Flintkote Company

APPENDIX.

Plaintiffs' "Statement of the Case" Is Distorted and Misleading.

At page 2, the following definition appears: " 'Contractor Defendants' or 'defendant contractors' shall refer to all other named co-conspirators." The definition is patently unfair: it proceeds on the assumption that all persons named in the First Amended Complaint were conspirators and that Flintkote conspired with them. It is conceded that evidence was received which might be construed as showing that the Downer Company conspired with other acoustical contractors to allocate jobs. However, the evidence does not compel that conclusion; and one of Flintkote's principal contentions on this appeal is that there is no evidence which would support a finding that Flintkote conspired with any contractors or at all. There is no reason to refer to the contractors as "defendants" except to place them in the same artificial category as Flintkote. The definition seems to assume that "defendant" is some sort of natural category or special characteristic of these contractors which is necessary properly to identify them. Certainly the fact that plaintiffs sued those persons and entities as well as Flintkote proves nothing, adds nothing to the description "contractors," and in no way advances any interests of clarity. Flintkote objected to characterizing the contractors as "defendants" in the instructions and during the trial; it has objected to such characterization in the trial court by this appeal; it objects to such characterization in connection with any statement of the case in any brief.

In addition to being an unfair and unwarranted description, the term is unfairly and inaccurately used in the brief. At page 15, plaintiffs refer to "numerous meetings [of Flintkote employees] with the contractor defendants at which appellees' competition with them was dis-

cussed." The evidence is that Flintkote employees called on the contractors who handled Flintkote tile at their offices and that there were telephone communications between said Flintkote contractors and Flintkote. There was no reference in the evidence to any meeting between any Flintkote representative and any contractor who did not handle Flintkote products. The quoted sentence is thus both erroneous and misleading.

At page 3, plaintiffs state that Flintkote "sells and consigns [acoustical tile] directly to the defendant contractors . . ." This statement is misleading in that Flintkote sells to some but not all of the contractors named in the First Amended Complaint, and plaintiffs recognize this in later portions of their brief (*e.g.,* p. 8).

Throughout plaintiffs' statement of the case, they ignore the plain fact that Flintkote had no contacts whatsoever with any acoustical contractor other than those to whom Flintkote sold acoustical tile. Plaintiffs seek to obscure this fact by the use of unwarranted generic terms to describe the Flintkote contractors, *e.g.,* "competitors of appellees" (p. 19, line 34; p. 22, lines 19 and 35; p. 23, line 8; p. 24, lines 31-32; p. 25, lines 12, 23 and 28; p. 26, line 13; p. 31, lines 17, 22, 27; p. 32, lines 3 and 31; p. 33, line 25), "Flintkote's co-conspirators" and "Flintkote's co-conspirator contractors" (p. 33), "its co-defendants" (p. 32). Obfuscation must have been the objective of such persistent misdescription.

Beginning on line 12, page 3, plaintiffs state: "Manufacturers do not place geographical limitations on their distributor outlets [R. 934; Ex. 11]." The citations do not support the statement. At page 934 of the Record, Ragland said that the territories of the Flintkote Los Angeles contractors were not limited. Exhibit 11 stated that Flintkote had recently placed its acoustical tile line in San Bernardino and Riverside with plaintiffs. Neither of those references support the broad allegation of the quoted

tatement. The statement is not otherwise supportable y the Record, either as respects Flintkote policies or, ı any event, as respects the policies of any manufacturer ther than Flintkote.

Beginning near the bottom of page 19, plaintiffs state: . . . Harkins, . . . was also meeting and convers- ıg with these same competitors. He personally called ıe defendant Newport and asked him to lunch . . . ɔ discuss appellees' competition". At the middle of page 1: ". . . at the same time Mr. Harkins met and bviously connived with Newport . . ." At the bottom f page 21: "Harkins, after personally conferring with ppellees' competitors . . ." Each of the foregoing is gross misrepresentation of the facts. There is nothing ı the record which even colorably supports those state- ıents. There is no evidence that Harkins saw, conferred vith, or mentioned plaintiffs to, any acoustical contractor ther than Newport, so the use of the plural form in the bove quotations is patently erroneous. Harkins said he sked Newport to lunch, and

> "Before we left for the Brown Derby I told Mr. Newport that I had heard about this story that Krause had called in, and so forth. I said, 'I want to make it perfectly clear to you that I am not going to discuss the matter of the aabeta company with you now. I don't want you to discuss it with me. When a decision is made it will be based on the facts as we find them and it will be for our benefit, it will be for the good of The Flintkote Company.' " (R. 1065-66.)

Harkins stubbornly stuck to this story throughout arduous ross-examination (R. 1091-93). There was no sugges- ion that Harkins' version of the luncheon was not en- irely accurate. The use of the phrase "obviously con- ived" is not merely unwarranted but is contrary to the ndisputed evidence.

Plaintiffs spend a not inconsiderable portion of their brief trying to establish the proposition that Flintkote's position that plaintiffs were not supposed to do business in Los Angeles was contrived for the purpose of obscuring the true nature of Flintkote's activities (*e.g.*, pp. 20, 21, 22, 25). Clearly there was a conflict between the testimony of plaintiffs and that of Flintkote's witnesses with respect to what the original understanding was, but the testimony of nine witnesses for Flintkote was uniformly to the effect that Flintkote at all times took the position that plaintiffs were not to do business in Los Angeles, and there is nothing even tending to show they ever deviated from that position.

There was also a conflict in the testimony as to whether Ragland knew of the existence of plaintiffs' Los Angeles office prior to his investigation of plaintiffs' activities at Mr. Harkins' request, but there is no evidence that any other Flintkote representative had such knowledge. The fact that the financial statement presented by plaintiffs bore the caption "aabeta co.—Los Angeles" is of no significance whatever. At that time the plaintiffs had no business address, and as they both had been operating in Los Angeles and both resided there, the legend on the document would be perfectly consistent with an intention to establish a business in San Bernardino. As a matter of fact, neither Harkins nor McAdow recalls having noted the item (R. 1105, 1121). The fact that the Ragland report (Ex. "I") contains some extraneous or irrelevant matters casts no doubt on its authenticity. Indeed, it tends to support its genuineness. It is just the sort of a report one might expect from a junior salesman in response to a commission "to find out if the various rumors we had heard were true" (R. 802). Had the report been contrived after the event, it seems clear that a more artistic job would have been done.

There is nothing in the testimony of Harkins, Thompson, Lewis, McAdow, Heller, Baymiller or Ragland that impugns the necessary conclusion therefrom that they honestly believed that the plaintiffs were not supposed to do business in Los Angeles. To assert the contrary requires one to contend that Harkins deliberately arranged for a fictitious report, caused it to be dated falsely, and that every Flintkote witness, as well as Krause and Howard, agreed on a false story, and that all gave deliberately perjured testimony on this subject at the trial. We say the only conclusion that could properly be drawn from the record in this case is that the Flintkote representatives acted entirely in good faith. There is no evidence to the contrary. A fact is proved by affirmative evidence, not by disbelief of a witness. (32 C. J. S., Evidence, §1045, p. 1134; *Moulton v. Moulton,* 227 N. W. 896 (Minn., 1929).) Yet, not only are plaintiffs willing to make the scandalous charge that all of the Flintkote witnesses got together on a deliberately fabricated story, but they are willing to say that this is the only possible conclusion the jury could draw from the testimony. Whether these reckless assertions could be excused as part of an argument is doubtful; they certainly have no legitimate place in what purports to be a statement of the facts.

The paragraph beginning at the bottom of page 22 and continuing through the middle of page 23 is also illustrative of the false, distorted, and misleading nature of plaintiffs' statement of the case. The references to "appellees' competitors" and "contractor defendants" obscure the plain fact that Flintkote had met with no one other than its own contractors. The statement that "in none of them [the meetings] did the contractor defendants state or admit that Flintkote took the position they now rely on" is false. Krause stated (R. 1125) that Lewis told him on the telephone that plaintiffs were to do business in San Bernardino and Riverside and not in Los Angeles.

Krause further stated (R. 1127) that Ragland told him " 'our agreement was for them to bid in San Bernardino and Riverside Counties only.' " Howard said (R. 1151) that "Some of the Pioneer-Flintkote people, either Mr. Heller or Mr. Baymiller", had told him plaintiffs were restricted to the San Bernardino-Riverside area. Hoppe could not recall any discussion with Flintkote representatives (R. 1010). The characterization of Lewis, Thompson, Baymiller, and Ragland as "officers" is erroneous. None of them are or were officers of The Flintkote Company and there was no testimony by anyone that they were. "Privy Counsel" is plaintiffs' idea and is not found in the testimony of anyone. Harkins did not state that he called a meeting at the time mentioned "for the alleged purpose of further discussing appellees' position and the action to be taken by Flintkote with respect to the demands of appellees' competitors". At page 1070 of the Record, Harkins stated that the discussion among himself, Thompson and Baymiller was "to be positive that there had been no misunderstanding in my mind or in theirs as to the terms and conditions under which we were approving them as acoustical contractors in San Bernardino." There is no suggestion in the record that "the demands of appellees' competitors" were discussed, mentioned, or in any way entered into the consideration of the parties to that meeting. What the jury considered is, for the most part, immaterial to a statement of the case and, in any event, is pure speculation in this setting for such consideration is not necessary to the verdict returned. The statement that Flintkote had not contacted plaintiffs in any way to find out whether they were doing business in Los Angeles is false. Ragland testified that he had talked to Lysfjord in the course of investigating plaintiffs' activities about whether plaintiffs were doing business in Los Angeles (R. 803-4, 923-24, Ex. I). There is no testimony that Ragland did not do so. It is thus apparent that no portion of the 15 lines just discussed is

rue or bears any resemblance either to the facts or to the estimony which was elicited during the course of the rial.

At pages 23-25 plaintiffs attempt to demonstrate that Flintkote refused to sell to plaintiffs in return for a promse by the other contractors to buy more Flintkote tile. There was absolutely no evidence to support that contenion; in fact the record affirmatively shows that the contention is false (Harkins, R. 1077, 1082; Krause, R. 1146). The statement that Acoustics, Inc. was substituted for Sound Control at or about the time plaintiffs were terminated is wrong. The two citations to the record are to statements that Sound Control was terminated "early" in 1952. At page 1009 of the Record, Hoppe said the termination was in "April or May". Exhibit "J" shows nothing about the date of termination, since the reason for such termination was that the Sound Control purchases were too small (R. 1009, 1044, 1078). The testimony was all to the effect that Acoustics was substituted for Sound Control, and any statement that Acoustics was substituted for plaintiffs is unwarranted and false. Acoustics, Inc. is characterized as "a relatively inexperienced newcomer in the acoustical contracting business" (pp. 24 and 26). The evidence is clear, however, that Acoustics had been in the acoustical tile contracting business since at least 1950, handling Fir-Tex tile, and was managed by an exceedingly capable and experienced man (R. 849-51). It is conceded that plaintiffs were competent and experienced workmen, but it is not conceded that they knew anything about or had any experience in connection with running a business: the evidence is that Waldron did not (R. 711-12) and there is no evidence that Lysfjord did. Obviously, then, any suggestion that plaintiffs, who were just getting started, were more experienced than Acoustics, which had been in the business for two years, or that Acoustics was

"relatively inexperienced" is wholly unfounded, false and misleading. The sentence at the bottom of page 24 and continuing on page 25 is one of the most gross misstatements in the brief. Exhibit "J", it will be recalled, merely shows the purchases of Flintkote acoustical tile by the various Flintkote contractors in Los Angeles during certain years. It shows that the purchases were larger in 1952 than they were in 1951—and that is all it shows. Yet plaintiffs have the temerity to state:

> "Finally, Exhibit J shows beyond doubt that commencing as soon as possible after Flintkote had agreed to and did accede to appellees' competitors' demands to eliminate appellees' competition, the three other Flintkote dealers increased substantially their purchases of Flintkote tile [R. 1043-1044, 1075-1076]."

Such unfair and unwarranted distortion of the facts is inexcusable.

The numbered paragraphs on pages 25-26 characterized as "evidentiary highlights" are exceptionally objectionable. Almost every statement in the entire list is wholly or partly false.

> "(1) Their admitted knowledge of the non-competitive nature of the industry as it existed in the Los Angeles area [R. 1086-1089];"

At pages 1086-1089 of the Record, Harkins testified that Flintkote tile was sold on a "split line" basis in Los Angeles, and why. There is no admission anywhere in the record that the industry in the Los Angeles area was non-competitive; nor is there any admission that Flintkote had any knowledge of the situation, if it existed. (The statements at pages 8 and 9 of appellees' brief characterizing the manufacturers' distribution systems in Los Angeles as monopolistic are similarly gratuitous.)

"(2) The objections of appellees' competitors to any new competition in the area, including specifically that of appellees;"

The evidence is that the Flintkote contractors, and no one else, objected to plaintiffs' doing business in Los Angeles.

"(3) The pertinent and admitted conniving as evidenced by the repeated and numerous conferences between Flintkote and appellees' competitors for the obvious purpose of finding ways and means and excuses to destroy appellees' competition;"

No "conniving" was ever admitted. Flintkote admits that certain Flintkote contractors objected to plaintiffs' being set up by Flintkote in business in Los Angeles without prior notice. The evidence is uniformly to the effect that Flintkote advised all of the Flintkote contractors that plaintiffs were not supposed to be doing business in Los Angeles and that when Flintkote determined what the facts were it would determine what Flintkote's best interests required. As an "evidentiary highlight," the quoted statement is false, is contrary to all the evidence, and is supported by none.

"(4) The concoction by Flintkote of a wholly unnecessary and irrelevant written report in a futile attempt to obscure their knowing cooperation in the destruction of appellees' acoustical tile business, their admitted destruction of same;"

There was no evidence that Ragland's report was not genuine in all respects and the suggestion that it was not is scurrilous and unfounded. There is no admission that Flintkote destroyed plaintiffs' business, and, on the contrary, plaintiffs' own evidence is that the business continued profitably to the date of the trial.

"(5) The contradiction between the testimony of appellees and the defense witnesses;"

That statement, surprisingly enough, is true, at least as to some of the testimony, though what it proves in a contested lawsuit is not readily apparent.

> "(6) The complete lack of any attempt by the defendants during the course of the trial and through the large number of contracting defendants called by Flintkote who were directly involved to inquire into or make any attempt to rebut or discredit the testimony of appellees and exhibits with regard to the bid allocation and price fixing scheme established against the contractor defendants, and finally, the undeniable fact that it was only after (a) appellant had investigated and approved appellees as Flintkote contractors and (b) thereafter at the behest of appellees' competitors, Flintkote admittedly destroyed appellees' acoustical tile business by taking away its sole supply of tile and almost immediately giving it to Acoustics, Inc., a relatively inexperienced competitor of appellees and a member of defendant Association."

Flintkote called three contractors to testify. These were the only ones with whom Flintkote had had any dealings. It made as much attempt as could be made through those witnesses to disprove any conspiracy among the contractors. Each of the contractors called by Flintkote denied that there was or ever had been any conspiracy among the contractors to fix prices or allocate jobs (Hoppe, R. 1012; Krause, R. 1131; Howard, R. 1152). It is not an "undeniable fact" that Flintkote gave a blanket approval to plaintiffs as Flintkote contractors; all of Flintkote's testimony denied that and was to the effect that plaintiffs were approved as Flintkote contractors in Riverside and San Bernardino. It is not an "undeniable fact" that Flintkote did anything "at the behest of appellees' competitors"; and all of the direct testimony was that Flintkote acted independently and at the behest

of no one. Flintkote, as above noted, never admitted that it destroyed plaintiffs' business or that plaintiffs' business was destroyed by anyone or at all. The statement that Flintkote took away plaintiffs' supply of tile and gave it to Acoustics is false and contrary to all the evidence. The suggestion that Acoustics was "relatively inexperienced" is false, at least in relation to plaintiffs. It is true that Acoustics was a member of the Association, but there is no suggestion anywhere in the evidence that membership in the Association had any relationship to Acoustics being chosen to replace Sound Control.

Even the statement of "Evidence on Damages" (App. Br., pp. 26-28) contains many misstatements and inaccuracies.

The record shows that plaintiffs paid not 17% to 20% but exactly 16.066% more for acoustical tile than they would have paid Flintkote for comparable items during the entire period to the time of trial (R. 1195).

The flat assertion that "appellees were unable to bid for acoustical tile jobs of any consequence, because of their lack of an assured source of supply of A. M. A. approved tile" is a gross overstatement of the evidence. The only statement in the record that any work at all was lost was ". . . we would lose the job, *because we were overpriced.* That happened." (Waldron, R. 274.) No specific instance was referred to. Lysfjord related a $60,000 or $70,000 job on which plaintiffs' bid was only $200 to $400 higher than the successful bidder, despite a mark-up of 50% above cost (R. 677). To make that bid plaintiffs admit they had an assured source of supply (R. 1212).

From plaintiffs' own books it was demonstrated that for the entire period up to the time of trial plaintiffs paid $9,240.82 more for acoustical tile than they would have paid at Flintkote prices (R. 1195)—not $12,758.57 as

plaintiffs state. The "conflict" was not in "opinion evidence". Plaintiffs' exhibits 38 and 39 were demonstrated to be inaccurate (R. 591, 592, 665-68, 702-03), but plaintiffs refused to correct them. Flintkote had to get the correct figures from plaintiffs' books and records.

As to the speculation by plaintiffs on how many carloads they expected to sell per month in operating their own business, plaintiffs make the amazing statement that "their opinion as to anticipated growth of their own venture" was not "seriously disputed or attacked during the course of trial." We assure this Court that our objections to that testimony offered repeatedly during the trial were entirely serious. (See Specification of Error No. 13 and pages 34-42, 110-114 of our Opening Brief.)